STATE OF MICHIGAN

ON APPEAL TO THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

vs.

Docket Number 126756
Court of Appeals No. 240385
Lower Court No. 01-500116

KIMBERLY STARKS,

Defendant/Appellee.

JOSEPH PULEO
Wayne County Prosecutor's Office
Attorney for Plaintiff/Appellant
1441 St. Antoine
Detroit, Michigan 48226
(313) 224-5748

BURKETT & WOODS
BY: ARLENE F. WOODS (P 40039)
Attorney for Defendant/Appellee
220 Bagley, Ste. 210
Detroit, Michigan 48226
(313) 961-0192

DEFENDANT/APPELLEE'S AMENDED BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted

ARLENE F. WOODS
Attorney for Defendant/Appellee
220 Bagley, Ste. 210
Detroit, Michigan 48226
(313) 961-0192

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN FAILING TO BIND THE APPELLEE OVER TO STAND TRIAL

The Appellant contends the answer is "Yes"

The Appellee contends the answer is "No"

The District Court ruled that the answer is “No”

The Circuit Court ruled that the answer is “No”

The Court of Appeals did not grant leave on this issue

II. DID THE APPELLANT ESTABLISH PROBABLE CAUSE THAT APPELLEE COMMITTED AN ‘ASSAULT’ WHICH IS A NECESSARY ELEMENT OF THE OFFENSE CHARGED

The Appellant contends the answer is "Yes"

The Appellee contends the answer is "No"

The District Court ruled that the answer is “No”

The Circuit Court ruled that the answer is “No”

The Court of Appeals did not grant leave on this issue

COUNTER-STATEMENT OF FACTS

The Appellee was charged in the within case with one count of criminal sexual conduct, assault with intent to commit sexual penetration, in violation of M.C.L.A. 750.520(g)(1). In order for this Honorable Court to have a full understanding of this case it is necessary for the Court to understand the background of not only this case, but the companion case involving another teen as well.

The Appellee was charged in the matter of People v. Starks, Case Number 01-10563, with Criminal Sexual Conduct Third Degree, Assault with Intent to Commit Criminal Sexual Conduct Involving Penetration and Criminal Sexual Conduct in the Fourth Degree. The alleged victim in that case, Dorian Dillard, claimed that shortly after arriving at the Herman Keifer Hospital in January 2001, as a patient in the Pause Program, the Appellee, who worked with the Pause Program as a counselor, called him into her office and took his hand and made him touch her breast. (Appendix, Pg. 014 B, L18-25) Dillard further claims that in June, 2001 the Appellee called him into her office and began to fondle his penis through his clothing. (Appendix, Pg. 015B, L 13-21) Dillard went on to testify that the Appellee then performed oral sex upon him while in the office culminating in an ejaculation. (Appendix, Pg. 015 B, L23-24) He further claims that the Appellee tried to engage him in such an act a second time and advised him to go to his room because she wanted to talk to him. Once inside his bedroom, however, he would not allow her to perform this act again. (Appendix, Pg. 016 B, L 24-25; Appendix, Pg. 017, L1-5). According to Dillard, the Appellee left his room upon his refusal to submit to a second sexual encounter and did not touch him in any manner. (Appendix, Pg. 017 B, L-4-13) Dillard denied that he discussed this incident with other boys at the facility and specifically denied telling Chevez Graves, who he claimed he did not even know. (Appendix, Pg. 031

B, L 7-19)[1]

Jonathan Jones, testified that he and another patient by the name of Chevez Graves observed the Appellee perform oral sex on Dorian Dillard while the two were in Dillard's bedroom. (Appendix, Pg. 14 A, L 10-13) Jones went on to testify that following this observation, while he was in the laundry room doing laundry the Appellee asked him if he "wanted his private parts sucked like Dorean"? (Appendix, Pg. 13 A, L 9-12) Jones testified that the Appellee then told him to pull down his pants. (Appendix Pg. 14 A, L 19-23) Jones further stated that after undoing his belt and pulling down his pants, another day care worker entered the room and the Defendant began cursing at him. (Appendix Pg. 15A, L 12-16) It should be noted that the day care worker, referred to by Jones, Manigualt, testified that he saw the Appellee bending over in front of the washing machine and Jones standing behind her. (Appendix Pg. 8A, L19-21) Contrary to Jones' testimony that he actually pulled his pants down, Manigualt testified that Jones' belt was unbuckled, his pants were unbuttoned and unzipped, and he was holding them so the pants wouldn't fall. (Appendix Pg. 9A, L 1-3)

On cross-examination Jones indicated that the Appellee never actually came into contact with his penis. (Appendix, Pg. 21A, L12-16) Jones further indicated that the Appellee never touched him, never touched any part of his body and never threatened him in any way. (Appendix, Pg. 21A, L 17-23) Jones, denied giving Manigualt an explanation as to why his pants were unzipped, however, in the statement to the police Manigualt indicated that Jones indicated that his pants were not open that he went in to get some laundry. (Appendix, Pg. 003-004 B) Jones specifically denied that he had given three different stories to an investigator working for the Pause Program, Miss, Morris, however,

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[1] Prior to trial the Appellant dismissed the charges against the Appellee in the

notes from Morris' interview with Jones, reflects that he gave three different versions of the event. (Appendix, Pg. 005-006B; Appendix Pg. 28A, L- 8-16) Jones admitted on cross-examination that he failed to bring this alleged incident to the attention of any one in the Pause Program and in fact never mentioned the incident until the Appellee "wrote him up." (Appendix, Pg. 27A-29A) Jones further testified on cross-examination that during the year he had been in the Pause Program, the Appellee had never said or done anything inappropriate toward him before. (Appendix, Pg. 29A, L 13-24)

Based on the testimony the district court judge dismissed the case involving Jones as the court found that there was neither a battery upon Jones nor was he placed in fear of a battery based on the testimony. (Appendix, Pg. 39A, L-14-25)

The Prosecution appealed the ruling of the district court arguing in the Wayne County Circuit Court that an assault may be committed by attempting to commit a battery and therefore the district court judge erred as a matter of law by finding no assault occurred based on the testimony at the Preliminary Examination. Specifically, Judge Vonda Evans found the following:

> But what we have is a woman clearly in authority over him, and that she was able to direct him down to this particular area. And I looked in the statute, and I could not find under this particular statute that a person being in authority over another individual would satisfy any requirements of the statute. But in fact, it was quite clear that with the charge as charged, that there has to be some type of battery. And the Court agrees with the legal analysis of the prosecution of what defines a battery. But the issue then becomes whether there was an overt act in preparation of this particular incident. And the Court believes that directing the young man to undo his pants, to take down his underwear without more is insufficient. And so, therefore, the Court believes that the Magistrate was correct in not finding probable cause.

Dillard matter and has not sought to re-file that case.

> The Court believes that as it indicated that assault is an attempt to commit a battery, which is defined as an intentional, un-consented and harmful or offensive touching of the person or something closely connected with that person that places another in reasonable apprehension of receiving an immediate battery. And so, therefore, the Court is not compelled at this time that there was a sufficient overt act.
> (Appendix, Pgs. 52A-53A)

The Appellant took issue with this ruling and sought to have the Circuit Court overturn the ruling of the district court. The Circuit court concluded that there was no overt act committed by the Appellee in preparation for the particular offense based on the reading of the transcript. (Appendix, Pg. 64A, L. 13-17) The Appellant then sought leave to appeal to the Court of Appeals. The Court of Appeals initially denied the application for leave to appeal for lack of merit on the grounds presented. The Appellant then sought delayed application for leave to appeal to this Honorable Court which remanded the case to the Court of Appeals with an order to address whether the Appellant presented sufficient evidence to establish a criminal assault. On remand the Court of Appeals ruled:

> The evidence showed that after arranging to be alone with a thirteen-year old boy, defendant offered to perform fellatio on him and told him to pull down his pants, which he started to do. Defendant did not expressly threaten to harm the boy; there is no evidence that she made any threatening gestures; the boy gave no indication that he was apprehensive of being injured or harmed in any way or that he was complying with the defendant's plan against his will. Although this evidence may have established probable cause to believe defendant attempted to commit criminal sexual conduct (***citation omitted)*** that was not the charge the prosecutor sought to bind over to circuit court for trial. The evidence presented at the preliminary examination failed to establish probable cause to believe that defendant committed an assault. Therefore, the district court did not err in dismissing that charge and the circuit court properly affirmed that ruling.

The Court of Appeals went on to agree with Justice Boyle's dissenting opinion in People v. Worrell, 417 Mich 617, 340 N.W.2d 612 (1983), and urged that this Honorable Court adopt the longstanding policy of the state that the complainant's consent, or lack of consent, is not germane in a prosecution for assault with intent to commit criminal sexual

conduct involving penetration with a child under the age of sixteen and encouraged this Court to overrule Worrell. (Appendix, Pg. 71A-72A) The Appellant sought Certiorari to this Honorable Court, which was granted and the parties were ordered to address whether the prosecution presented sufficient evidence in the case to establish a criminal assault and to bind the defendant over on the charge of assault with intent to commit criminal sexual conduct involving penetration. (Appendix, Pg. 73A) The Appellee respectfully submits that the prosecution did not present sufficient evidence of the charged offense, even if this Court were to overrule Worrell and adopt the dissenting opinion as the law as it relates to assault with intent to commit criminal sexual conduct involving penetration. Thus, the dismissal under either the prevailing rule of Worrell, or pursuant to the standard, which the dissenting opinion urges, is still appropriate.

ARGUMENT

I. Standard of Review

A magistrate's ruling that alleged conduct falls within or without the scope of a criminal statute is a question of law reviewed for error, and a decision to bind or not to bind a defendant over to stand trial is reviewed for ***abuse of discretion.*** See, People v. Drake, 246 Mich App 637 633 N.W.2d 469 (2001) The circuit court reviews a district court's decision whether to bind a defendant over to stand trial for an abuse of discretion. A "circuit court must consider the entire record of the preliminary examination and it may not substitute its judgment for that of the magistrate. Id. at 639. An abuse of discretion arises only where an unprejudiced person considering the facts upon which the act acted, would say no justification or excuse for the ruling existed. People v. Orzame, 224 Mich App 551, 557, 570 N.W.2d 118 (1997) To bind a defendant over to the circuit court for trial, the magistrate must determine that sufficient evidence was adduced to establish both that a

felony has been committed and that there is probable cause for charging the defendant therewith. While the prosecution need not establish guilt beyond a reasonable doubt at a preliminary examination, it must establish that there is probable cause to hold the accused to trial. Toward that end, evidence regarding each element of the crime or evidence from which the elements may be inferred must exist.

In the instant case the prosecution failed to establish that there was any battery, or attempted battery, which would establish or from which any inference could be drawn that an "assault" occurred and therefore the district court judge properly dismissed the case. Similarly the circuit court found no overt act occurred therefore the circuit court did not err as the Appellant argues.

II. The Prosecution Failed to Establish The Necessary Element of Assault

MCLA 750.520(g)(1) provides in pertinent part:

> Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than ten years

The statute requires both an assault; and that such assault be made with the express intent to commit sexual penetration. Pursuant to MCLA 750.520(g)(1) assault has been defined by Michigan courts to include:

> Either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.

People v. Robinson, 145 Mich App 562, 564, 378 N.W.2d 551 (1985). In People v. Reeves, 458 Mich 236, 580 N.W.2d 433 (1998), this Honorable Court held that an assault is not made out absent proof that the assailant is within actual striking range of the victim. Reeves reiterated that a defendant must have "present ability," i.e. the act done must have been sufficiently proximate to the thing intended, it must have proceeded far enough

towards a consummation thereof so as to be an actual assault. As the court noted in People v. Worrell, 417 Mich 617, 340 N.W.2d 612 (1983), an assault is any attempt or offer, **with force or violence to do a corporal hurt to another, whether from malice of wantonness, with such circumstances as denote, at the time an intention to do it, coupled with a present ability to carry such intention into effect.** Stated differently, "an assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate injury to a human being." See, also 2 Bishop, Criminal Law (7th ed) Section 23, People v. Carlson, 160 Mich 426; 125 N.W. 361 (1910). As the Worrell Court stated "there can be no assault without proof of force or threat thereof." Worrell, supra at 622.

The Court of Appeals and the Appellant herein urge this Court to overrule itself in Worrell and adopt the dissenting opinion offered by Justice Boyle. Appellee contends that even adopting the dissenting opinion, the Appellant did not make out the offense for which it charged the Appellee. Justice Boyle wrote:

> In cases of this kind it is not necessary that it should be shown, as in rape, that the accused intended to gratify his passion at all events. If he intended to have sexual intercourse with the child, and took steps looking towards such intercourse and laid hands upon her for that purpose, although he did not mean to use any force, or to complete his intent if it caused the child pain and desisted from his attempt as soon as it hurt, he yet would be guilty of an assault with intent to commit the crime charged in the information. Force, against the will of the female, is not a necessary element of the crime charged here. Sexual intercourse is sufficient, and if an assault is made, with the design of sexual intercourse with a child under the statutory age; the crime of an assault with intent to carnally know and abuse the child is committed.

The Appellee actually agrees with this analysis, as well as the fact that a child of thirteen-years cannot consent. A review of the dissenting opinion, however, clearly establishes that the Appellant did not establish probable cause that the Appellee committed an assault. The key words in Justice Boyle opinion that exonerates the Appellee of these

charges is the requirement that she took steps looking towards such intercourse and ***laid hands upon*** the thirteen year old. Justice Boyle in his dissenting opinion acknowledged that the prosecutor must still prove an assault, i.e., **an overt act and the intent to commit sexual penetration.** The record in this case is completely devoid of any allegation that the Appellee ever put a hand on the complainant. The Appellee is alleged to have asked the complainant if he wished to have a certain sexual act performed upon him, and told him to take his pants down. The complainant unbuckled his pants and before he could remove his pants or take his underwear down, Appellee's co-worker entered the room. The act of telling the complainant to take his pants down is not sufficient to establish an assault under the prevailing standard enunciated in Worrell, nor is it sufficient to establish an assault even adopting the dissenting view in Worrell, as the Court of Appeals and the Appellant herein urge.

The Appellant urges that an assault can be an attempt to commit a battery, which is defined as "an intentional, un-consented and harmful or offensive touching of the person of another, or of something closely connected with the person or an act that places another in reasonable apprehension of receiving an immediate battery. See, Perkins on Criminal Law (2d ed) p. 117. See also, People v. Patterson, 428 Mich 502; 410 N.W.2d 733 (1987). Appellee does not disagree that an assault can be an attempt to commit a battery, however, the record at the District Court is devoid of any attempt to commit a battery. At most, there may have been some preparation. Even with preparation, toward the battery, there can be no attempt toward the battery without proof of force or threat thereof under the present standard enunciated in Worrell. As the Court of Appeals in People v. Bowen, 10 Mich App 1, 158 N.W.2d 794 (1968) made clear:

> The mere intent to commit a crime is not a crime. An attempt to perpetrate it is necessary to constitute guilt in law. One may arm himself with the purpose of seeking and killing an adversary and may seek and find him, yet, if guilty of no over act, commits no crime.

In People v. Pippin, 316 Mich 191, 25 N.W2d 164 (1946), the Supreme Court reversed the trial court's order finding the defendant to have violated his probation. The defendant in Pippin had on a prior occasion been convicted of gross indecency, admitted guilt and was placed on probation. Subsequently, the defendant was arrested and charged with violation of his probation in that he attempted to entice a 13-year old boy into his automobile. Apparently the defendant was sitting in his automobile one evening and as the boy passed by the defendant he beckoned to him, whereupon the young boy opened the car door and defendant asked whether he knew what was on at the show, his age and where he lived. The defendant offered to take him home and invited him into the car for a ride. the boy declined the invitation and ran home. The Supreme Court said the question was "whether the defendant could be convicted of attempt to commit the crime of gross indecency." The court assumed, ***arguendo***, that intent had been established, but ruled that an overt act had not been established in that "the act (committed by Pippin) at most could only be considered no more than preparation for the attempt. As the Supreme Court observed:

> Between preparation for the attempt and the attempt itself there is a side difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made.

Pippin Id. at 195.

Even as urged by Justice Boyle in his dissent, the assault must have proceeded far enough towards the consummation thereof. Worrell, Id. at 634.

In the case sub judice, Jones testified that the Appellee never touched him. The evidence clearly establishes that she never touched his clothing or anything closely connected with Jones. At no time did the Appellee ever threaten him with violence and there was no testimony that he was ever in fear of having the Defendant touch him. If the Court believes Jones' testimony, and Appellee contends that his testimony is quite suspect. Assuming, however, that his testimony rings true, all that the evidence shows is that the Appellee asked him if he wanted to have a certain act performed and once he agreed, Jones unzipped his pants, did not remove his underwear and held his pants up so that they would not fall down. Recognizing that attempt is a question of degree, the degree of proximity held sufficient may vary with the circumstances, including among other things the apprehension, which the particular crime is calculated to excited. Bowen, supra, at 15. In the instant case, all the testimony revealed, at best, was preparation to attempt a battery. As has been stated, at no time did the Appellee ever touch Jones. As the circuit court judge correctly noted the Appellee was some two feet away from Jones. The evidence at the preliminary examination was that the Appellee was bending over in front of the washing machine and Jones was standing behind her. (Appendix, Pg. 8A, L 19-23) While the Appellant urges that sending the other youth out of the laundry room, closing the door which automatically locks, and that but for Manigault walking into the room the act would have been consummated, even assuming all of that to be true none of those things constitute an overt act. As with the defendant in Pippin, the actions of the Defendant herein at most can only be considered preparation for the attempt. See also, People v. Cooper, 461 Mich 912, 604 N.W.2d 66 (1999) "The aim of the law is not to punish sins, but to prevent certain external results, the act done therefore must come pretty near to accomplishing that result before the law will notice it. See, Commonwealth v. Kennedy,

170 Mass 18, 48 N.E. 770 (1897).

III. Statutory Construction of Charged Offense

The Supreme Court explained the primary rule for statutory interpretation in Sun Valley Foods Co. v. Ward, 460 Mich 230, 236, 596 N.W.2d 11 (1999) and this Honorable Court in People v. Tomasovich, 249 Mich App 282 (2002) reiterated:

> The rules of statutory construction are well established.
> The foremost rule, and our primary task in construing a statute
> is to discern and give effect to the intent of the Legislature.
> This task begins by examining the language of the statute
> The words of a statute provide the most reliable evidence
> of its intent. If the language of the statute is unambiguous
> the Legislature must have intended the meaning clearly
> expressed, and the statute must be enforced as written.
> No further judicial construction is required or permitted.

Justice Boyle in his dissenting opinion acknowledges that the Legislature intended to create a strict liability crime consisting of the defendant's intent and conduct. Thus according to the statute under which the Appellee was charged, the dissent would make the crime of assault with the intent to commit sexual penetration only where an over act with the intent to achieve sexual penetration with a person under 16 years of age is accomplished. Thus even overruling Worrell and applying the standard set forth by the dissent, the Appellant was still required to show an overt act, which if completely failed to do at the district court level.

The Appellant has continuously made the argument that the Appellee's position of authority over Jones should be a factor in the courts determination that an "assault" took place. Appellee argues that such an argument is disingenuous and this Honorable Court should not give it any consideration. The statute under which the Appellant charged Appellee does not make any provision for or state that this offense applies if a person is in a position of authority. If the Appellant believed that Appellee's position of authority was

used to coerce Jones to submit, Appellant could have charged Appellee under the statute, which recognizes the position of authority as an element of the offense. Since Appellant chose not to so charge the Appellee, this Court should disregard any argument concerning the Appellee's position as it is not an element of the offense charged.

MCL 750.520b(1)(f)(i)-(v) sets forth in great measure those examples or force or coercion to include acts of physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or concealment or surprise to overcome the victim. Surely, the Legislature had it intended could have specifically included among these examples, the exertion of authority. While counsel for Appellee appreciates the overwhelming need for our laws and courts to protect our children from sexual predators, and in particular children placed in our state's facilities, counsel would argue however, that there needs to be a legally sufficient showing that a violation of the Michigan criminal sexual conduct laws have been broken by an adult. Just as the rights of the children must be protected, so too must the rights of the adults entrusted with the care of these children be protected. Where as here, the prosecution fails to present a scintilla of evidence to support a finding of the elements of the crime this Honorable Court should not abandon well established law, in order to assist the prosecution in fashioning a crime against a citizen where the Legislature has not defined a crime. This Honorable Court must be mindful of the evidence actually presented at the Preliminary Examination. There was absolutely no evidence from which the examining magistrate could reasonably find that the charged offense had been committed and that there was probable cause to believe that the Appellee committed the charged offense. Appellee contends therefore that the dismissal was not an abuse of discretion and the magistrate's dismissal should not be reversed.

CONCLUSION

An assault can be an attempt to commit a battery, however, the record at the district court is devoid of any attempt to commit a battery. At most, there may have been some preparation, however, preparation without some overt act toward the battery, cannot form the basis for the sexual act. Jones testified that the Appellee never touched him and did not threaten him. Moreover, the record was devoid of any testimony that the Appellee ever touched Jones. The only evidence before the district court and the circuit court was testimony that the Appellee allegedly asked Jones if he wanted to have a certain act performed and once he agreed, Appellee told him to unzip his pants, which he did, however he never removed his pants, his underwear or anything else. At best, the Appellant can only show that steps were taken in preparation for some act, which does not constitute assault as there was no touching by the Appellee and thus no overt act as required by the dissenting opinion. Thus, the circuit court as well as the district court was correct to dismiss the charges, there was no abuse of discretion and the ruling should not be overturned.

The words of a statute provide the most reliable evidence of its intent. If the language of the statute is unambiguous the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Even as Justice Boyle noted, the Legislature intended to create a strict liability crime consisting of the defendant's intent and conduct and the offense is completed when the defendant commits an over act with the intent to achieve sexual penetration with a person under 16 years old. The prosecution must prove an over act in order to make out the elements of the crime of assault with intent to commit sexual penetration under MCL 750.520(g)(1).

RELIEF REQUESTED

The Appellee prays that this Honorable Court will deny the Application for leave to Appeal and allow the dismissal to stand.

Respectfully submitted,

ARLENE F. WOODS
Attorney for Defendant
220 Bagley, Ste. 210
Detroit, Michigan 48226
(313) 961-0192

Dated: March 28, 2005